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UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE

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MONTANA MINING COMPANY, LIMITED,

Plaintiff in Error.

vs.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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At the former trial of this case the St. Louis Company obtained a verdict and judgment for the value of the ore extracted from the Drum Lummon vein by the plaintiff in error north of the 108-foot plane. The Montana Company being dissatisfied with the judgment brought the case by writ of error to this court. A reference to the opinion of this court (102 Fed. Rep. 430) will disclose that the title of the St. Louis Company to the ore for which a recovery was had at the first trial was disputed solely upon the ground that by the conveyance of the compromise strip all mineral beneath the surface thereof was conveyed, although the same was in fact contained in that part of the Drum Lummon vein or lode which has its apex wholly within the boundaries of the St. Louis claim. This court in its opinion say:

> "The principal contention in the case concerns the construction to be given to a conveyance which was executed by the owners of the St. Louis claim to the owners of the Nine Hour claim."

The court further said:

> "It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation, and and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles, and also all the metals, ores, etc., therein.'"

The judgment of the lower court was affirmed.

At the first trial the lower court held that the St. Louis Company could not recover for ore extracted from that section of the Drum Lummon vein, the apex of which was divided by the west boundary line of the compromise ground. This holding precluded a recovery for any ore taken south of the 108-foot plane. The St. Louis Company prosecuted a cross writ of error to this court. This court in its opinion on such writ of error (104 Fed. Rep. 664) said:

> "The assignments of error raise but one question

which need now be passed upon, all others having been adjudicated, upon the writ of error of the defendant in error herein, in the case of Montana Min. Co. v. St. Louis Min. & Mill. Co. (C. C. A), 102 Fed. Rep. 430. The question for present consideration is: When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong?"

After a discussion of the question this court further said:

"Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing within the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of the ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated."

When the two opinions of this court are considered it clearly appears that the title to the Drum Lummon vein, to the extent that any part of the apex is within the St. Louis claim, was adjudicated and determined to be in the

St. Louis Company. The Montana Company claimed title to all of the ore by virtue of the conveyance of the compromise ground. It further denied the extralateral right of the St. Louis Company south of the 108-foot plane, because a part of the apex of the Drum Lummon vein south of such plane is within the compromise ground. Both of these contentions were decided adversely to the Montana Company.

It is now contended in behalf of the Montana Company that this court should decide the case irrespective of its former opinions and the same as though the case were here for the first time. The assignments of error present every question considered by this court in its former opinions in the case.

The law with reference to the controlling effect of a former decision by an appellate court in the same case is so well established and has been so often recognized and applied by this court that it seems needless to cite authorities. In the opinion in the case of Roberts v. Cooper, 20 Howard 481, it is said:

> "It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but

there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

In the case of Leese v. Clark, 20 Cal. 387-417, Mr. Justice Field states the reasons underlying the doctrine announced in the quotation just made, as follows:

"The supreme court has no appellate jurisdiction over its own judgments; it can not review or modify them after the case has once passed, by the issuance of the remittatur, from its control. It construes, for example, a writen contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration; whether right or wrong, it has become the law of the case. This will not be controverted. So, on the other hand, if upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial; it is just as final to that extent as a decision directing a particular judgment to be enterd is as to th character of such judgment. The court can not recall the case and reverse its decision after the remittatur is issued. It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below."

In the case of Bissell, etc. Co. v. Goshen, etc. Co., decided

by the circuit court of appeals for the sixth circuit, 72 Fed. Rep. 545, Circuit Judge Lurton said:

"It seems to us that the opinions and decrees of this, as a court of appellate jurisdiction, are final and conclusive upon every point actually decided, and that it is the clear duty of the lower court to give effect to the decree without modification or enlargement, in the very terms of the decree here rendered. They must be either conclusive or merely advisory; they can not be both, or partly one and partly the other. The function of a court is to consider and decide, not to advise. There must be a general rule; and a reasonable rule, predicated upon the very objects and purposes of appellate jurisdiction, is that whatever is actually decided by such a court is finally settled, and is no longer open to review, reconsideration, or re-examination for any purpose other than its due execution. Neither would such a decree be open for reconsideration upon a second appeal to this court. If the decree of the lower court is in accordance with the decree and mandate of this court, there is nothing to appeal from. To appeal from such a decree would, in effect, be an appeal from our own decree. No appeal lies from this court to this court."

This court in the case of Republican Min. Co. v. Tyler Min. Co., 79 Fed. Rep. 733, said:

"The contention of the plaintiff in error is that the defendant in error has no extralateral right to follow the lode or vein in the Tyler mining claim in its downward course beyond the southerly side line of the Tyler claim, for the reason that, as shown in the diagram, the lode or vein passes through the

side line of the Tyler location. It is further contended that any rights which the defendant in error may have by virtue of its ownership of the Tyler claim must date from the establishment of 'the intermediate end line first made on the ground after the commencement of this action.'

"Both of these questions have been decided by this court adversely to the contention of plaintiff in error. It is well settled by numerous decisions of the supreme court that where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the procedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error."

The case just cited is a direct authority to the effect that the right of the St. Louis Company to follow the Drum Lummon vein beyond its side line is not now open to inquiry.

In the case of Mathews v. Columbia Nat'l Bank, 100 Fed. Rep. 393, this court said:

"In the appellate courts of the United States, and in nearly all, if not all, the appellate courts of the states, a second writ of error or a second appeal in the same case only brings up for review the proceedings of the trial court subsequently to the mandate, and does not authorize a reconsideration of any question, either of law or of fact, that was considered and determined on the first appeal or writ of error."

In the case of Mutual Reserve Fund Life Association v. Beatty, 93 Fed. Rep. 747, this court said:

"It is clear that the decision of the circuit court of appeals upon the former writ of error is the law of the case, and, so far as the court has considered the questions at issue, they must be deemed to be *res judicata* and not open for review at this time. The law upon this subject has been established by numerous decisions."

See also the following cases decided by this court:

Sweeney v. Hanley, 126 Fed. Rep. 98.

Oregon R. & N. Co. v. Balfour, 90 Fed. Rep. 295.

Mutual Life Ins. Co. v. Hill, 118 Fed. Rep. 708.

Empire State-Idaho Min. Co. v. Hanley, 136 Fed. Rep. 99.

To the same effect see:

Thompson v. Maxwell, etc. Co., 168 U. S. 451.

Re Sanford Fork & Tool Co., 160 U. S. 247.

Chaffin v. Taylor, 116 U. S. 567.

Board of Supervisors v. Kennicott, 94 U. S. 498.

Stewart v. Salamon, 97 U. S. 361.

Magwire v. Tyler, 84 U. S. 253.

Balch v. Haas, 73 Fed. Rep. 974.

Board of Commissioners v. Geer, 108 Fed. Rep. 478.

Montgomery County v. Cochran, 126 Fed. Rep. 456.

Guarantee Co. v. Phenix Ins. Co., 124 Fed. 170.

Morgan v. Johnson, 106 Fed. Rep. 452.

Texas & P. Ry Co. v. Wilder, 101 Fed. Rep. 198.

Bissell etc. Co. v. Goshen etc. Co., 72 Fed. Rep. 545, p. 552.

Stoll v. Loving, 120 Fed. Rep. 805.

It necessarily follows as a corollary to the proposition of law announced in the authorities above cited, that the

lower court was not at liberty to consider, during the second trial of the case, any issue which was not affected by the errors causing the reversal.

It is claimed in behalf of the plaintiff in error that the case stands unaffected by the former decision of any question involved, because of the form of the judgment rendered and entered on the 8th day of October, 1902, and the language of the mandate to the lower court. In the first place we submit that the form of the judgment and the language of the mandate do not evidence any intention on the part of this court to absolutely nullify its decision, and in the second place, that the law determines the effect to be given to the former decision without regard to the form of the judgment or the language of the mandate.

The judgment reverses the case and directs that a new trial be had. The mandate commands:

> "That such new trial and further proceedings be had in said cause, in accordance with the judgment of this court, * * * and as according to right and justice and the law of the United States ought to be had," etc.

This court, by its judgment, had decided every issue involved in the case except the issue of damages. It is true that this does not appear from the judgment itself, but it was not necessary that it should. The opinions contain the conclusions upon which the judgment is based, and are just as much a part of the judment as though incorporated therein. When a judgment is pleaded as an estoppel or in bar of another action, it is permissible to look to the entire record, and the courts will even resort to parol proof to determine what was decided.

Black on Judgments, Vol. 2, 2nd Ed. Sec. 624.

In the case of Empire State-Idaho Mining Co. v. Hanley,

136 Fed. Rep. 99, this court said:

> "It thus appears that it is settled by the adjudication of this court that the exclusion of the appellee from the mine continued at least until May 6, 1901. *The fact that the views of the court so expressed in the opinion are not contained in the mandate which issued to the lower court renders them no less conclusive as the law of the case.*" (The italics are ours.)

The lower court construed the mandate in the light of the opinions of this court and limited the scope of the issues on the new trial to the questions which had not been decided. This was clearly correct.

In the opinion in the case of Board of Supervisors v. Kennicott, 94 U. S. 498, it is said:

> "It is true that, after reversing the decree of the circuit court upon the former appeal, it was further ordered that the cause be remanded 'with directions to award a new trial;' but the mandate as sent down 'commanded that such execution and further proceedings be had in conformity to the opinion and decree of this court, as according to right, etc., ought to be had.' Technically, there can be no 'new trial' in a suit in equity; and as our mandates are to be interpreted according to the subject-matter of the proceedings here, and, if possible, so as not to cause injustice (Story v. Livingston, 13 Pet. 359), it is proper to inquire what must have been intended by the use of that term in the decree, since it can not have its ordinary meaning. For that purpose we held in West v. Brashear, 14 Pet. 51, that resort might be had to the opinion delivered at the time of the decree. Availing ourselves of this rule, it is

easy to see that there could have been no intention to open the case for further hearing upon the issues presented and decided here. There is not an expression of any kind in the opinion indicating any such determination. On the contrary, it is distinctly declared that the mortgage was valid, and that the complainants were entitled to their judgment. Under these circumstances, it is apparent that the words 'new trial' were used to convey the idea of such further action as should be found necessary to carry into effect what had been already decided. No error has been assigned upon the proceedings in the circuit court under the mandate construed in this way, and the decree of the circuit court is, therefore, affirmed."

In the opinion in the case of Thompson v. Maxwell etc. Co., 168 U. S. 451, the court said:

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error can not be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. * * * We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case.

"We therefore turn to the former opinion and mandate to see what was presented and decided."

In the case of Re Sanford Fork & Tool Co., 160 U. S. 247, the court said:

"The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and even upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

In the case of Gaines v. Caldwell, 148 U. S. 228, the court said:

"It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the circuit court; that the circuit court had a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this court,' but also 'according to right and justice;' and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This can not be allowed, and is not in accordance with the opinion and mandate of this court. * * *

"What it remained for the circuit court to do was only the taking of the account in the manner indicated by this court. This court, in its opinion, overruled all of the objections taken to the title, and to say that its decree virtually reversed the whole decree of the circuit court is to say that it has done that which it said in its opinion ought not to be

done. Under its opinion, it intended to reverse only a part of the decree, and that is all it did. It substantially affirmed that part of the decree below which related to the title, and virtually only modified the entire decree, and that only in respect to taking the account.

"In construing the mandate or in determining the action to be taken thereon, in case of a general order or incomplete directions, the lower court should look to the reasons stated in the opinion of the appellate court, and be governed thereby in the action taken." (Cyc. L. & P., Vol. 3, p. 491.)

This court first affirmed the judgment of the lower court, and then on the writ of error prosecuted by the St. Louis Company, remanded the cause for a new trial "as to damages alleged and recovery sought for conversion of ore" between the 108 and 133-foot planes. As there could be but a single judgment in the case the effect of the last decision was to reverse the entire judgment of the lower court, and this court entered a judgment accordingly. When this judgment is considered in connection with the opinions, as it should be, it is apparent that there was no intention to nullify the decision made. What had been decided became the law of the case, and the lower court was clearly right in eliminating from its consideration, and the consideration of the jury, the issues which had already been finally determined by this court.

In the case of Kinsman v. Page, 24 Vt. 656, it is said:

"The reversal of a judgment of the county court, only opens such issues as were affected by the errors, for which the judgment is reversed."

See also:

Strother v. Aberdeen & A. R. Co., 31 S. E. Rep. 386.

Hardin v. Shedd, 52 N. E. Rep. 380.

Broughel v. Southern etc. Co., 45 Atl. Rep. 435.

Southern Ry Co. v. O'Bryan, 4 S. E. Rep. 1000.

Chandler v. Peoples' Savings Bank, 73 Cal. 317.

Kent v. Whitney, 9 Allen 62.

In the opinion in the last case cited the court said:

> "Although the evidence offered by the defendant was erroneously rejected, we are of opinion that he is not entitled to a new trial of the whole case. The evidence which the court refused to admit had no bearing whatever on the title to the property in question, or its conversion by the defendant. These questions had been settled by the verdict of the jury, under rulings to which no exception has been taken, and they ought not to be again reopened."

In the brief of the plaintiff in error it is said that the doctrine of the "law of the case" has been carried so far in some instances that an appellate court has refused to review a former decision in the same case, even though it was erroneous. It is further said that "This ridiculous position, however, is being rapidly overturned." In every instance where it is sought to have an appellate court review its former dicision in the same case it is, of course, contended that the former decision was erroneous. If the appellate court is required to consider the question of the correctness of its former decision, and, if found erroneous, to decide to the contrary, then every case would be decided without regard to the former decision, and there would be no end to litigation. Unless we are to ignore the numerous decisions of the supreme court of the United

States and of this court and other federal courts, we must take issue with the statement that the doctrine of the law of the case is "ridiculous" and "is being rapidly overturned." An appellate court can not, in its discretion, review or refuse to review its former decision in the same case, but it is absolutely precluded by established principles of law from considering what it has already decided.

In the case of Magwire v. Tyler, 17 Wall 253, it is said:

> "Appellate power is exercised over the proceedings of subordinate courts, and not over the judgments and decrees of the appellate court, and the express decision of this court in several cases is that 'the court has no power to review its decisions, whether in a case at law or in equity, and that a final decree in equity is as conclusive as a judgment at law,' which is all that need be said upon the subject."

In the opinion in the case of Clark v. Keith, 106 U. S. 464, it is said:

> "That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error can not be re-examined on a subsequent writ brought in the same suit."

In the case of Roberts v. Cooper, 20 Howard 467, it is said:

> "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. * * * We can now notice, therefore, only such errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial."

In the case of Illinois ex rel Hunt v. Illinois C. R. Co., 184 U. S. 77, it is said:

> "Every matter embraced by the original decree of the circuit court, and not left open by the decree of this court, was conclusively determined, as between the parties, by our former decree, and is not subject to re-examination on this appeal."

In the case of Stewart v. Salamon, 97 U. S. 361, Mr. Chief Justice Waite observed:

> "An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal will be from ourselves to ourselves."

This court said in the case of Mathews v. Columbia National Bank, 100 Fed. Rep. 393:

> "In the appellate courts of the United States, and in nearly all, if not all, the appellate courts of the states, a second writ of error or a second appeal in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question, either of law or of fact, that was considered and determined on the first appeal or writ of error."

In the case of Balch v. Haas, 73 Fed. Rep. 974, Circuit Judge Thayer said:

> "Another form of stating the doctrine is that propositions of law which were considered and decided on the first appeal become the law of that particular case, and, whether right or wrong, must be adhered to on a second appeal."

In concluding this branch of the case we respectfully submit that the only issue open for consideration in the lower court on the second trial was the issue of damages. On the first trial, by the verdict of the jury and the judgment of the court, it was determined that the St. Louis Company has title to that part of the Drum Lummon vein, the whole of the apex of which is within the St. Louis claim. This court affirmed the judgment of the lower court as to the title to that section of the Drum Lummon vein north of the 108-foot plane. The decision of the lower court, to the effect that the St. Louis Company does not own that part of the Drum Lummon vein which has its apex on both sides of the west boundary of the compromise ground, was overruled, and it was expressly held by this court that the St. Louis Company is the owner of the Drum Lummon vein to the extent that any part of the apex of such vein is within the St. Louis claim, with the extralateral right attaching thereto. It follows, that the question of title to the vein and ownership of the ore extracted therefrom has been eliminated from the case.

* * * * *

The first error assigned relates to the sufficiency of the complaint. It is contended in behalf of plaintiff in error that "the complaint does not state facts sufficient to constitute a cause of action." This court is asked to reconsider its former opinion regarding this matter.

This very question was presented and decided on the former hearing before this court. In the opinion the same objections now made to the complaint were considered, and it was held that these objections were without merit, and that the complaint states a cause of action and is sufficient to sustain a judgment. Such holding is the

law of the case, and this court is without jurisdiction to again consider the question.

> Northern Pacific v. Ellis, 144 U. S. 458.
>
> Board of Commissioners v. Geer, 108 Fed. Rep. 478.

It is claimed that the complaint should contain allegations with reference to the strike, dip and length of the discovery vein, and that it was error to admit proof as to these matters in the absence of such allegations. In the complaint it is alleged that the plaintiff is the owner, in the possession and entitled to the possession

> "of that certain quartz lode mining claim known as the St. Louis quartz lode mining claim, and of the quartz rock, ore and precious metals contained in any and all veins, lodes and ledges or mineral bearing rock through their entire depth, the tops or apices of which lie within the surface lines of said fractional portion of said St. Louis lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis quartz lode mining claim."

The complaint also alleges that the ores in controversy were taken from a vein which has its apex within the surface boundaries of the St. Louis claim. These allegations are equivalent to a direct allegation of ownership and possession of that part of the Drum Lummon vein from which the ores were extracted. It is an elementary rule of pleading that it is not necessary to state evidence, but only to plead ultimate facts. The allegation of ownership is an allegation of an ultimate fact and clearly warranted the introduction of any proof essential to establish such fact.

It was not necessary to allege why the St. Louis Company owned this vein, any more than it would be necessary, in an action for trespass upon agricultural land, to allege the source of title. The decision of this court as to the sufficiency of the complaint was clearly correct.

Furthermore, any question regarding the discovery vein was not open for consideration and determination by the lower court on the second trial. This court had finally decided the issue of title, which issue incidentally involved the inquiry as to the strike and dip of the discovery vein and its length through the claim.

> Republican Mining Co. v. Tyler Min. Co. 79 Fed. 733.
>
> Sweeney v. Hanley, 126 Fed. Rep. 98.
>
> Gaines v. Caldwell, 148 U. S. 228.

* * * * *

Although any inquiry regarding the discovery vein had become immaterial, proof was introduced from which the jury found, under the instruction of the court, that the discovery vein has such a strike and dip and extends for sufficient length through the claim as to entitle the St. Louis Company to extralateral rights on that part of the Drum Lummon vein, from which the ore in controversy was taken.

The question of the sufficiency of the evidence to sustain the verdict is not before the court, but we quote below some of the evidence relative to the discovery vein, because in the brief of plaintiff in error there are statements made with reference to the discovery vein which are entirely unwarranted.

Witness Mayger testifies regarding the discovery vein as follows:

"It runs very nearly parallel with the side line of

the St. Louis. We have traced the vein to within ninety-five feet of the end line at the south end, and to a distance of about four hundred feet from the north end. It dips to the east at an angle of about eighty degrees from the horizontal. We have sunk on this vein, to a depth of about 425 feet. The St. Louis Company has extracted over $41,000 worth of ore out of the discovery vein in both the north and south tracts, from the transcontinental tunnel. That part of the vein disclosed in the southerly drift of the transcontinental tunnel is developed on the lower levels to within ninety-five feet of the south end line, and it is a good strong vein at that point, extending in the direction of the end line." (Record. pp. 41-42.)

Witness Water Proctor Jenny testifies as follows:

"I have examined the discovery vein of the St. Louis lode mining claim. Its course is substantially north-east and south-west. I believe that the discovery vein extends the full length of the claim from end line to end line. Explorations under ground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line. I find an outcrop within 150 feet of the north end line, which I believe to be the outcrop of this discovery vein. The dip of the vein is easterly from seventy-five to eighty degrees." (Record pp. 60-61.)

Witness John R. Parks testified:

"The discovery vein of the St. Louis is a gold appearing fissure vein running in the general direction of the side lines. The vein is developed both northerly and southerly from the transcontinental

tunnel. There are levels running on the vein about 250 feet below the transcontinental tunnel. It has a dip of about eighty degrees to the east. The transcontinental tunnel follows a fissure and there is a fault of the lode caused by that fissure, which causes a throw of the vein of about 95 feet."

* * * *

It is next contended in behalf of the plaintiff in error that the former decision of this court to the effect that the St. Louis Company is the owner of that part of the Drum Lummon vein, the apex of which is on both sides of the west boundary of the compromise ground, is erroneous. A request is made that this court reconsider its opinion and decision in respect to this matter.

During the last trial of the case in the lower court, one of the attorneys for the defendant, Mr. W. E. Cullen, stated that "it was admitted by the defendant that the foot wall of the Drum Lummon vein crossed the west side of the compromise strip approximately at its intersection with the 133 foot plane." (Record p. 107.) There was, therefore, no question of fact in the case regarding the place at which the foot wall of the Drum Lummon vein crossed the west boundary of the compromise ground.

It thus appears that this court is asked to again consider and decide the identical question of law which it has already thoroughly considered and decided. We submit that the former decision is correct and that this court cannot, if it were so inclined, again consider the question. The authorities establish conclusively the proposition that what has been once decided by an appellate court is not open to review on a second appeal or writ of error. The lower court treated the question as foreclosed by the decision of this court. (Record pp. 45-48.)

The opinion and decision of this court on this subject has been regarded as a correct exposition of the law by all courts in which a similar question has arisen.

In the case of Bunker Hill etc. Co. v. Empire etc. Co., 106 Fed. Rep. 471, District Judge Beatty said:

> "The Viola and San Carlos are parallel to each other, are located along the course of the ledge, and each has within its surface a portion of the apex. The Viola, being the older, would, by the weight of authority, take the whole ledge. If this court had any doubts on that proposition, it still would be controlled by the late decision in St. Louis etc. Co. v. Montana etc. Co., 104 Fed. Rep. 664, by the circuit court of appeals of this circuit. The wisdom of the decision is illustrated in this case."

See also opinion of circuit court of appeals in same case, 131 Fed. Rep. 591.

In the brief of plaintiff in error it is said, in speaking of the opinion of this court upon this question:

> "It has been accepted without dissent, by both Mr. Lindley and Mr. Snyder, in their works on mines, and has been cited in a number of cases since decided."

In the brief for plaintiff in error it is stated that the opinion of this court regarding the title and ownership of the Drum Lummon vein south of the 108-foot plane is based upon the proposition "that the St. Louis claim having the eldest location and patent, was entitled to the whole of the vein so long as it had any portion of the apex within its surface boundaries," etc. (Brief p. 62.) It is also said in speaking of the decision of the question: "In so holding, this court entirely overlooked the fact that the compromise strip was patented as a part of the St. Louis

claim," etc. (Brief p. 62.) The statement that the opinion of this court in respect to this matter was based upon the fact that the patent to the St. Louis claim was issued prior to the patent for the Nine Hour claim is wholly unwarranted. A reference to the opinion discloses that this court only considered the seniority of location as between the two claims. In the opinion it is said:

> "That inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the *senior locator*, the entire vein must be considered as apexing upon the *senior location* until it has wholly passed beyond its side line." (We have italicized.)

In the 5th paragraph of the complaint (Record pp. 5-6) it is alleged that the Nine Hour claim included the compromise ground and that the discovery and location of the St. Louis claim was prior to the discovery and location of the Nine Hour claim. The allegations of this paragraph are admitted by the answer. Furthermore, a reference to the judgment roll in what is termed the "specific performance case" will show that it was alleged in the complaint in the case, and the judgment was recovered upon the theory, that the compromise ground was always a part of the Nine Hour claim.

It does not require any argument to establish the proposition that the only material inquiry is regarding the priority of location as between these two mining claims. The right of the parties are controlled by the locations, irrespective of the date when either patent was issued.

Counsel for plaintiff in error call attention to the fact that the area in conflict between the claims was much greater than the area embraced within the compromise ground. It is claimed that the ore in controversy was all

taken from that part of the Drum Lummon vein, the whole of the apex of which was within the Nine Hour claim, as located, and consequently, the question of priority of location is immaterial. There are several reasons why such a position can not be maintained.

1. It is an admitted fact in the case that the compromise ground, which is specifically described in the complaint, was a part of the Nine Hour claim, and there is no allegation in the answer that any greater area than that included in the compromise ground was a part of the Nine Hour claim.

2. Any question as to the boundary line between the two claims was fully and finally disposed of by the settlement and compromise which resulted in the bond for a deed or contract to convey.

3. The judgment in the specific performance case has forever foreclosed any inquiry regarding the original boundaries of the Nine Hour claim. In that case it was determined that the boundary line between the two claims had been established by the compromise and settlement and the contract to convey. In the opinion of the supreme court of the State of Montana in the case (20 Mont. 405) it is said: "What did the parties do? In order to settle a costly and troublesome lawsuit they entered into a compromise, by which they settled the title among themselves to the ground in dispute and fixed the boundary line between their two claims." The parties to that action were the same as the parties to the case now before the court.

4. This court has already decided that the St. Louis Company is the owner of the Drum Lummon vein to the extent that any part of the apex is within the surface

boundaries of its claim, and this decision is the law of the case.

We shall not attempt to further discuss the matter, but respectfully refer the court to the briefs filed in this court on behalf of the St. Louis Company, and considered on the former hearing.

* * * *

Assignments of error V, VI and VII are spoken of in the brief of plaintiff in error as of "minor importance." Authorities are cited, however, to sustain the contention that the admission of the map referred to in assignment of error VI was error.

The map was not offered as evidence, and neither was it claimed that the same was correct. The sole purpose for which it was used was to illustrate the testimony, and the court admitted it for this purpose and for no other. (Record p. 59.) That no error was committed, see

Jordan v. Duke, 53 Pac. Rep. 197.

People v. Figueroa, 66 Pac. Rep. 203.

Hall v. Conn. Mut. Life Ins. Co., 79 N. W. Rep. 497.

For a discussion of the question of the admissibility of maps and diagrams, see:

Wigmore on Evidence, Vol. 1, Sections 790-795, and cases cited in notes.

The map is not before this court, but it is apparent from the testimony that it was a surface map. It could not in any manner have related to the quantity and value of the ore extracted, which was the only issue open for consideration. We have already called attention to the fact that it is admitted that the crossing of the west boundary line of the compromise ground by the foot-wall is at the intersection of such line with the 133-foot plane. So far as the

record shows, the map is correct except in the particulars pointed out by the witness Mayger. The statements in the objection to its introduction certainly can not be received as evidence of its incorrectness.

* * * *

The next proposition advanced in behalf of the plaintiff in error is that by the judgment in what is termed the "specific performance case," it was conclusively determined that the plaintiff in that case, the Montana Company, was entitled to a conveyance of that part of the Drum Lummon vein lying beneath the surface area of the compromise ground. In other words, that such judgment establishes the right of the plaintiff in error to the ore in controversy. This contention presents again the question of title, which has already been adjudicated by this court. The record on the former writ of error contained the judgment roll in the "specific performance case," and, so far as the position now taken with reference to the judgment in that case is concerned, the conditions are not in any particular different from what they were when the case was before this court on the former writ of error. The decision of this court renders every question then considered and which might have been considered, *res judicata* between the parties.

In the case of Guaranty Co. v. Phenix Ins. Co., decided by the circuit court of appeals for the Eighth circuit (124 Fed. Rep. 170), Circuit Judge Sanborn in the opinion said:

> "This condition of the record suggests the query whether the questions raised by the rulings of the court during the trial were not rendered *res judicata* by the former judgment of this court upon the writ of error sued out by the plaintiff. *That judgment, like the final decision of every court which has*

> *jurisdiction of the matters and parties it judges, rendered every question which was litigated and every question which might have been raised and determined in this court at the time of the hearing of the former writ of error* res judicata *between the parties to it.*" (We have italicized.)

In the brief of plaintiff in error it is said that in the specific performance case the question of the right to the mineral in the compromise ground was distinctly in issue,—in fact the main issue in the case,—and was "fought out to the court of last resort." An examination of the pleadings and the judgment in the case will disprove these statements. The construction of the contract to convey was not involved in the case and could not have been litigated. The purpose of the action was to secure a conveyance in accordance with the terms and provisions of the contract. The judgment reads, in part, as follows:

> "It is ordered, adjudged and decreed that the agreements set forth in the contract herein, a copy whereof is attached to the complaint as an exhibit, be specifically performed, and that the defendant, the St. Louis Mining and Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to the said plaintiff a good and sufficient conveyance in fee simple absolute, free from all incumbrances, of and for the premises mentioned in the complaint and hereinafter described." (Record, p. 104.)

The description contained in the judgment is in the identical language of the contract.

In view of the pleadings and judgment in the case, it is idle to contend that the question of the construction of the contract to convey was an issue in the case or considered

or decided. The judgment is necessarily limited in its operation by the pleadings, and the pleadings do not warrant any relief beyond a judgment requiring a conveyance in accordance with the contract.

The only question, therefore, is: What was meant and intended in the contract to convey, in the judgment and in the deed, by the expression, "together with all mineral therein contained?" This very question was before this court on the former writ of error and thoroughly considered, and decided. In the light of these circumstances and the law with reference to the controlling effect of a former decision of an appellate court in the same case, it seems entirely useless to again discuss the question.

As a matter of fact, the pleadings, findings of fact and conclusions of law in the specific performance case constitute a complete answer to the claim made that it was the intention of the parties to the contract that the conveyance should embrace the ore in controversy in this action. A full and fair statement of the facts in the case was made by Mr. Chief Justice Fuller when the case was before the supreme court of the United States, to which reference is hereby made. (171 U. S. 650.) It appears from the complaint in the case that the compromise ground was the entire area in conflict between the Nine Hour and the St. Louis claims; that Mayger applied for a patent to the St. Louis claim, and in the survey he caused to be made or his claim he included a part of the Nine Hour lode mining claim; that thereupon an action was commenced to determine the right to the possession of the compromise ground; that afterwards, "to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode mining claim and the said St. Louis lode mining

claim," the bond for a deed or contract in question was executed and delivered. The entire complaint was based upon the theory that the compromise ground was, at the time the contract to convey was made and always has been, a part of the Nine Hour claim, and that the purpose of the contract was to establish the boundary line between the two claims the same as it would have been established if the area in conflict had not been included in the application made by Mayger for a patent to the St. Louis claim. The plaintiff in the case did not claim a right to the conveyance by virtue of an assignment of the contract, but based its right to a conveyance upon the fact of its ownership of the Nine Hour claim.

It was because of this position taken by the plaintiff in the specific performance case, and the theory upon which it had succeeded in obtaining a judgment, that the case was taken to the supreme court of the United States by the St. Louis Company. In the opinion of the supreme court of the United States (171 U. S. 650) it is said:

> "The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the government which sustains this proposition."

When the entire record in the specific performance case

is considered it is apparent that, instead of the question of the right and title to the ore in controversy herein being "fought to a finish," as a matter of fact, the case was litigated to a conclusion in the Supreme Court of the United States upon the theory advanced by the plaintiff in the case, that the compromise ground was always a part of the Nine Hour claim, and the purpose of the arrangement resulting in the bond for a deed, was to settle and establish the boundary line between the St. Louis and Nine Hour claims. This theory is wholly inconsistent with the idea that the owners of the Nine Hour claim were to receive more by the conveyance than they would have obtained if a patent had been issued to them for the compromise ground as a part of the Nine Hour claim. The plaintiff in the case took the position that by the conveyance of the Nine Hour claim it had acquired the equitable title and right to the possession of the compromise ground and was entitled to a conveyance of the legal title, which had been acquired by Mayger, as trustee for the owners of the Nine Hour claim. Whether or not the compromise ground had been located as a part of the Nine Hour claim or as a part of the St. Louis claim was distinctly an issue in the case, and the court found that it was always a part of the Nine Hour claim, and that by reason of this fact and the arrangement made whereby title was to be taken by Mayger, with the understanding that the same would be conveyed, the plaintiff was entitled to the conveyance. The action was in fact an action to declare and enforce a trust although termed an action for specific performance.

During the second trial of this case in the court below evidence was offered for the stated purpose of showing the intention of the parties to the contract to convey, in order that the contract might be construed in accordance with

such intention. Error is assigned upon the refusal of the court to receive such evidence. There are several conclusive reasons in support of the action of the lower court with reference to this matter.

1. The Montana Company, plaintiff in error, had, in the action for specific performance, taken the position that the compromise ground was always a part of the Nine Hour claim; that the purpose of the agreement for a settlement and compromise was to establish the boundary line between the two claims, and that, although there had been no assignment of the contract, the conveyance to it of the Nine Hour claim operated as a conveyance of the equitable title to the compromise ground and entitled it to a conveyance of the legal title. In brief, the Montana Company had taken the position that it was entitled to be placed in the same position it would have occupied if the compromise ground had been conveyed by the United States as a part of the Nine Hour claim. The evidence offered was for the purpose of showing an entirely different intention. The purpose of the evidence was to establish that it was the intention of the parties that the ore in controversy in this case, although in a vein which has its apex within the St. Louis claim, was intended to be conveyed, thereby disproving the allegations in the complaint in the specific performance case upon which judgment had been recovered. This was not permissible.

In the case of Davis v. Wakelee, 156 U. S. 680, the court said:

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position,

especially if it be to the prejudice of the party who hasacquiesced in theposition formerly taken byhim. Thus in Philadelphia W. & B. R. Co. v. Howard, 54 U. S. 307, where a corporation sought to defend against an instrument by showing that the corporate seal was affixed thereto without authority, and that it was not, sealed or unsealed, intended to be the deed of the corporation, evidence was held to be admissible to show that, in a former suit, the corporation had treated and relied upon the instrument as one bearing the corporate seal. In delivering the opinion, the court observes: 'The plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington & Susquehanna Railroad Co. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtely admissible. * * * * * The defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil county court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, a fraud in law, if he does not know it to be true. * * * We are clearly of opinion that the defendant can not be heard to say, that what was asserted on a former trial was false, even if the assertion was made by mistake. If it

> was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it.' "

It is immaterial whether the position taken in the specific performance case, or the position now taken, is correct. The fact is that the Montana Company recovered a judgment, and it is now estopped from disputing what it then asserted in order to secure such judgment. Let us assume that the position which it took in the specific performance case was because the St. Louis Company had acquired the interests of three of the parties to the contract. If, then, it had claimed under the contract, it could have only acquired an undivided interest in the compromise ground. Now, that its interests have changed, it should not be allowed to treat the conveyance as a conveyance of a part of the St. Louis claim.

2. This court in its opinion (102 Fed. Rep. 433) said:

> "It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyence would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining

claims, 'together with dips, spurs, angles, and also all the metals, ores, etc., therein.' "

Here we have an express decision by this court that the words, "together with all mineral therein contained," are not sufficient to deprive the St. Louis claim of its extra-lateral rights. If, then, it was the intention to do so, the intention was not expressed, and the remedy which the plaintiff in error should have invoked was an action to reform the contract. This being an action at law, and, furthermore, there being no allegation of any mistake as a basis for a reformation of the contract, the same must be taken according to its language.

In the case of Muldoon v. Deline, 31 N. E. Rep. 1091, the circuit court of appeals of New York said:

> "The defendant upon the trial offered parol evidence of the conversations and negotiations between Burton and the planitiff, and of other circumstances, to show that it was not the intention of the parties to the deed to include therein the land in question, and that the first course in the deed should not run at right angles with Rust street, but diagonally, so as to strike the southerly line of lot 137 forty feet from the southerly line of lot 121. There is no ambiguity in the description contained in the plaintiff's deed. Every line can be surveyed on the ground just as it is given, and the grantor had the land. When the description is applied to the land, no ambiguity is produced, and hence there is no room for parol evidence. It is true that the intent of the parties to the deed must control. But that intent must be ascertained from the language contained in the deed. * * * The defendant, in his answer, did not allege any mistake, and asked

for a reformation of the deed. It is possible that there is a mistake in the descriptions contained in the deeds of both of these parties. If the defendant has any remedy it is by an action to reform the deeds; and to that action probably Burton, the grantor, would be a necessary party, and perhaps also Harrington, the grantee of the lot lying southerly of the plaintiff's. With all the parties before the court in such an action, parol evidence might be given to show mistake, and, if the defendant could clearly establish the mistake, he might procure a reformation of the deeds, unless equitable considerations, after the lapse of so much time and changed conditions, should impel the court to deny the relief. But in this legal action, with these two parties only before the court, the deeds as written must control."

See also:

Resurrection Min. Co. v. Fortune Min. Co., 129 Red. Rep. 668.

3. A final and conclusive reason in support of the action of the lower court in refusing to receive such evidence is that the issue of title had been determined by this court, and no inquiry regarding the same was permissible.

This position is anticipated and sought to be overcome in the brief of counsel for plaintiff in error. It is said that the law declaring the former opinion of an appellate court in the same case conclusive of the questions decided only applies where different or additional evidence is not introduced when a new trial is had in the court below. This statement is both correct and incorrect. When a new trial is had after a decision by an appellate court, the scope of the issues is limited by the decision of the higher court. The lower court is at liberty to, and should, try

again such issues as are affected by the errors committed on the former trial and are left open by the appellate court. It should not and can not try any issue which has been finally disposed of. If, upon the second trial, different or further evidence is introduced respecting an issue which has not been foreclosed, by the decision of the higher court, the higher court will consider the questions presented regarding such issues. In the case at bar the question of title was finally settled and determined by the former decision of this court, and as the lower court was not authorized to try this issue again, the evidence offered was not admissible, and the doctrine that a higher court will not consider itself bound by a former decision in the same case where the record presents a different state of facts than was presented on the first writ of error or appeal, does not apply. Unless the rule is as stated, then every issue in a case is open for trial where the judgment of the lower court is reversed, and there is no such thing as any question being finally determined by a decision of a higher court reversing the judgment of a lower court. In support of the rule, as we undrestand it, see the cases hereinbefore cited as to the effect of a decision of an appellate court, and particularly:

> Gaines v. Caldwell, 148 U. S. 228.
>
> Board of Supervisors v. Kennicott, 94 U. S. 498.
>
> Leese v. Clark, 20 Cal. 387-417.
>
> Republican Min. Co. v. Taylor Min. C., 79 Fed. Rep. 733.

Where an appellate court has construed a contract, such construction becomes the law of the case.

> United States v. Pacific etc. Co., 104 U. S. 480.
>
> Sharpstein v. Friedlander, 63 Cal. 78.

The lower court in sustaining the objection to the evi-

dence offered said:

> "My belief is that the deed was executed having reference to the acts of congress, and that the words of the deed did not include the minerals in that portion of the vein apexing outside of the compromise strip." (Record, p. 112.)

In what is termed the "specific performance case" the right of the plaintiff was not based upon any contractual relation with Mayger or the St. Louis Company. There is no allegation of any assignment of the interests in the contract of either of the contracting parties. The case proceeded upon the theory that the compromise ground was always a part of the Nine Hour claim; that the grantors of the Montana Company always had the equitable title to this ground, which was conveyed to the Montana Company by the conveyance of the Nine Hour claim; and that Mayger, by his patent, acquired the bare legal title to the ground, which, in equity and good conscience, belonged to the owners of the Nine Hour claim. The allegations of the complaint and the theory of the case characterizes it as an action to declare and enforce a trust. The case stands the same as where A purchases real estate and for some reason directs that the title should be transferred to B to be held in trust for A. In view of these considerations it is apparent that the Montana Company only acquired, by the judgment in the case and the conveyance made pursuant thereto, the legal title to the compromise ground, to which it and its grantors always held the equitable title. The judgment in the case conclusively estops the Montana Company from claiming more than its grantors would have received if the patent to the Nine Hour claim had included the compromise ground.

* * * *

The next assignment of error relates to the amendment of the *ad damnum* clause of the complaint. It appears that on the 26th day of June, 1899, what is termed the "second amended and supplemental complaint" in the action was filed. (Record p. 9.) In this complaint damages are claimed for ore extracted by the plaintiff in error from the time of the filing of the original complaint in the action to the 26th day of June, 1899. The ore so extracted was alleged to be of the value of $50,000.00. At the former trial the complaint stood as it does at the present time with the exception that the allegation as to the value of the ore extracted from the time of the commencement of the action to the filing of the amended and supplemental complaint has been changed from $50,000.00 to $400,000.00. No error is assigned to the action of the court in permitting the amended and supplemental complaint to be filed, and, so far as the record discloses, the same was filed without objection. The right to object has been waived, and this seems to be conceded by counsel for plaintiff in error. In the case of Witowski v. Hern, 86 Cal. 604, the court said:

> "Even if the amendment thus made alleged a new cause of action arising after suit brought, and the amendment was wrongfully allowed, the appellants are not now in a position to object. They answered the third amended complaint. If they had any good ground of objection, they waived it by the course pursued."

It is claimed, however, that although the amended and supplemental complaint may have been filed without objection, the amendment made thereto, which is now complained of, was unauthorized. The motion to amend was made after the taking of the testimony had been con-

cluded. (Record p. 175.) The evidence on the part of the plaintiff showed the value of the ore in the ten blocks to be $276,610,38. (Record pp. 71-74.) The witness Parks testified that the ore body between the two planes and above the 190-foot level, outside of the blocks designated, has a value of $132,290.44. (Record p. 76.) The record does not show that this ore body was not extracted. In the objection to the proposed amendment it is said:

> "There is no testimony in the case showing or tending to show that the damage, if any, exceeds the sum of $276,000.00."

After the filing of the amended and supplemental complaint the right to recover was the same as though the action had been commenced on June 26th, 1899.

In the case of Spurlock v. Missouri Pacific Ry. Co., 16 S. W. Rep. 834, it appeared that the cause of action stated in the original petition had been changed in a third amended petition filed, to which no objection was interposed. Subsequently, by leave of court, a fourth amended petition was filed, to which objection was made. In the opinion in the case the court said:

> "Having gone to trial on the amended petition it is quite too late for the defendant to raise the question that the fourth amended petition had changed the cause of action from what it was in the original petition."

The court may, in its discretion, grant the right to amend the *ad damnum* clause at any time before judgment.

Graves v. N. Y. etc. Ry Co., 160 Mass. 402.

Cain v. Cody, 29 Pac. Rep. 778.

Ellis v. Ridgway, 1 Allen 501.

Chamberlain v. Mensing, 51 Fed. Rep. 511.

M. O. P. Co. v. B. & M. Co., 27 Mont. 288.

Bamberger v. Terry, 103 U. S. 40.

Mack v. Porter, 72 Fed. Rep. 236.

Bowden v. Burnham, 59 Fed. Rep. 752.

In the case of Chamberlain v. Mensing, 51 Fed. Rep. 511, cited above, the court said:

> "The damages are not the cause of action. The cause of action is the wrong done to the plaintiffs. The right to recover damages grows out of this wrong done, because of the wrong."

In the brief for plaintiff in error it is stated that "the proofs left it uncertain as to many of the blocks, how much ore was extracted before and how much after June, 1899." It is also said that by allowing the amendment to be made the court permitted the plaintiff to extend the period for recovery to the date of the amendment.

The witness Burrell, manager of the Montana Company, testified as follows: "I know where the 108 and 133 foot planes are. Such ore as was taken out between these planes was mined between the 1st of November, 1898, and about the middle to the 20th day of April, 1899." (Record p. 139.) "All of the ore which was extracted from the vein south of the Montana Company's apex shaft to the 133-foot plane and above the 190-foot level was taken out by the defendant prior to June 1st, 1899." (Record p. 140.) "The raise was made to the 85-foot level, and the excavation of block 8 was made in November, 1898." (Record p. 161.)

Block 10 is on the 190-foot level, and this level was run during the time that the witness Goodale was consulting engineer for the Montana Company, which was from 1893 to 1898. (Record pp. 136-137.) It was contended in behalf of the plaintiff in error that blocks 4 and 9 do not exist. The witness Goodale testified that blocks 4 and 9

are still in the ground. (Record p. 137.) The record does not show that a pound of ore was extracted after June 1st, 1899, but, on the contrary, it does show conclusively that all of the ore in controversy was extracted prior to that date.

Blocks 2, 3, 4, 5, 6 and 7 are all between the 108 and 133 foot planes. (Record pp. 71-74.) The amount of ore contained in these blocks was of the value of over $250,000.00, according to the testimony of the witness Parks.

It should be remembered that the amendment was not made until after the close of the testimony. The amendment did not change the dates between which it was alleged the ore was extracted. No objection was offered to the proposed amendment upon the ground that it extended the date of recovery. There was no objection to any of the evidence regarding the extraction of ore upon the ground that the same was uncertain as to the time when the ore was extracted, or that it related to ore extracted after June 26th, 1899. Furthermore, the court expressly instructed the jury thatt here could be no recovery for ore extracted after June 26th, 1899. The plaintiff in error could not have been prejudiced by the amendment, and there was no claim or basis for any claim that it was taken by surprise.

In concluding this branch of the case, we respectfully submit that no error was committed in permitting the amendment to be made. Lange vs. U. P. R. R. Co. 126 ...

Chapman vs. Barney 129 U. S. 677-680

* * * *

The remaining assignments of error discussed relate to the charge of the court to the jury. It appears from the the record (pp. 199-200) that during the argument of the case the lower court directed the attention of the attorneys for the respective parties to the recent decision of

this court in the case of Mountain Copper Co. v. Van Buren, 133 Fed. 1, and to the case of Harney v. Tyler, 2 Wall 328, and advised counsel that Rule 58 would be construed in accordance with the decisions in these cases. The attorneys for the plaintiff in error are now presenting objections to several of the instructions given which were not made in the exceptions taken to the charge before the jury retired. We submit that, under the circumstances, such objections should not be considered by this court.

The first instruction complained of is No. 17. The only objection made to this instruction before the jury retired was "that it is contrary to law, is not sufficiently guarded and is misleading to the jury." (Record p. 203.) Such objection is wholly insufficient in view of the rule announced in the case of Harney v. Tyler, supra, which was approved by this court in the case of Mountain Copper Co. v. Van Buren.

It is said that this instruction in effect required the jury to find that the defendant was guilty of a wilful trespass in extracting ore subsequent to the commencement of the action. The instruction is not subject to any such interpretation. It does not relate to the nature of the trespass, but has reference solely to the weight to be attached to the evidence regarding the quantity and value of the ore taken. In other words, it relates to the same matter covered by the preceding instructions, 15 and 16. It in effect told the jury that the commencement of the action was notice to the defendant of the plaintiff's claim, and that with such notice if the defendant failed to keep an account of the quantity and value of the ore subsequently taken it should not be permitted to receive any benefit from the trespass, and that it was the duty of the

jury to resolve any doubt as to the value and quantity of the ore in favor of the plaintiff. This statement of the law was clearly correct.

> Armory v. Delamirie, 1 Smith's Leading Cases, Pt. 1, p. 151.
>
> Little Pittsburg etc. Co. v. Little Chief etc. Co., 11 Colo. 223.

Even though this instruction could be construed to relate to the nature of the trespass, which it can not, it correctly states the law when taken in connection with instructions 11, 12, 13 and 14.

It is next claimed that instructions numbered 11 and 18 are incorrect and that the court erred in refusing request No. 43 of the plaintiff in error. No exception was taken to instruction No. 11 before the jury retired, nor is there any objection to this instruction in the record. The only exception taken to the instruction numbered 18 before the retirement of the jury was that "it is contrary to law and does not correctly define what mining and milling expenses may be deducted." The request designated as No. 43 is not contained in the record. Under these circumstances the assignments of error relating to the instructions numbered 11 and 18 and request No. 43 should not be considered.

Instruction No. 11, however, is clearly correct and states the rule as announced by this court in the case of Sweeney v. Hanley, 126 Fed. Rep. 97.

See also

> Reservation etc. Co. v. Fortune etc. Co., 129 Fed. Rep. 668.

The objection made to instruction No. 18 is not discussed in the brief of plaintiff in error.

The next assignment of error discussed relates to in-

struction No. 19. The exception taken to this instruction before the retirement of the jury is as follows: "It does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case." (Record p. 205.) In the bill of exceptions subsequently presented further objections were made. (Record p. 209.) The objections to this instruction made in the lower court are not discussed by counsel for plaintiff in error, but another objection which was not presented in the lower court is considered. We submit that the court should not notice the objection now made for the first time in this court, and further submit that the instruction is correct as a matter of law. The objection that the plaintiff did not have such possession of the Drum Lummon vein as would entitle it to maintain an action of trespass is disposed of by the former opinion of this court. (102 Fed. Rep. 435.) The instruction as a whole correctly states the law.

Assignment of error XXXI is addressed to instruction No. 32. The only objection to this instruction made before the retirement of the jury was "that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it." (Record p. 206.) Further objections are interposed in the bill of exceptions. (Record p. 211.) The contention made with reference to this instruction in the brief of plaintiff in error is not based upon any objection in the record.

The witness Burrell testified: "The ore from block 8, which was taken out after the modification of the injunction order, was taken down to the 190-foot level and from the 190-foot level to the 400. This ore was put in the chutes with other ore. All of the ore in the chutes was taken

out together." (Record p. 170.) The witness Mayger testified: "The ore taken from blocks 8 and 11 and all of the blocks between the 133-foot plane and the 108-foot plane outside of the ores that were taken in 1893, were all mixed together promiscuously from the 190-foot level to the 400." (Record p. 171.) No evidence was offered by the defense as to the value of the part of the ore extracted from block 8 removed under the authority of the court, and in fact proof of the value of the ore was impossible because the ore was mixed with other ores.

This court in its former opinion in the case (102 Fed. Rep. 436) said:

> "Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoinng it from 'disposing of, treating, and reducing any ores heretofore removed or extracted from said premises,' for the reason that such ores were held subject to the order of the court, and has not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ores had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or left in the possession of, the

defendant in error, and to have submitted evidence of their value."

What is said by the court in the foregoing quotation fully answers all objections to instruction No. 32.

Assignments of error XXIII, XXIV and XLIV are next discussed. These assignments relate to instructions 5, 8 and 11. It is claimed that the court erred in telling the jury "that the defendant must prove certain specified features 'to their satisfaction.'" (Brief p. 126.)

No objection to instruction 11 is contained in the record. The objections now urged to instructions 5 and 8 were not made in the lower court. The only objection interposed to these instructions was because the same do not correctly state the rule on the subject of burden of proof. (Record pp. 204, 205 and 208.)

When instructions 5, 8 and 11 are read in connection with instructions 14 (Record p. 190) and 25 (Record p. 195) the objection made disappears. Taking the instructions as a whole, the jury were told that they should only be satisfied by a preponderance of the evidence. It is a fundamental rule that in considering the correctness of an instruction the whole charge must be read.

In the case of Louisville & N. R. Co. v. White, 100 Fed. Rep. 230, a similar objection to an instruction was made, and it was held that the objection was not well taken.

The last assignments of error discussed in the brief of plaintiff in error refer to instructions 5, 8, 9, 14, 15, 16 and 20.

No exception whatever was taken to either instruction 9, 14, 15 or 16 in the lower court. The only exception to instruction 20 taken before the jury was sent out was "that it is misleading, contrary to law and unapplicable to the facts." This was clearly insufficient, in that it does

not point out any specific objection, as required by the rule announced by this court in the case of Mountain Copper Co. v. Van Buren, 133 Fed. Rep. 1. The sole objection to instruction 8 made before the jury retired was that "it is contrary to the law in that no presumption whatever arises with reference to the course of the discovery vein." (Record p. 205.) This is not the objection now urged.

Instruction 14 correctly states the law. In the case of Reservation Gold Min. Co. v. Fortune Gold Min. Co., 129 Fed. Rep. 668, decided by the circuit court of appeals for the Eighth circuit, it is said:

> "The wrongful taking of the ore, in the absense of all other evidence, raises a presumption of fact that the trespasser took it intentionally and wilfully. This presumption, however, is a disputable one, which evidence may so completely overcome that it will become the duty of the court to instruct the jury that it can not prevail."

See also:

> United States v. Homestake Min. Co., 117 Fed. Rep. 481, 486.
>
> St. Clair v. Cash Gold Min. Co., 47 Pac. Rep. 467.

Instructions 15 and 20, both of which relate to the same subject, are not open to criticism.

> Armory v. Delamirie, 1 Smith's Leading Cases, Pt. 1, p. 151.
>
> L. P. Min. Co. v. L. C. C. Min. Co., 11 Colo. 223.

The objections to instruction 16 are clearly without merit. It was proper under the circumstances of the case to receive evidence as to the value of ore in the vicinity.

> Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. Rep. 420.

If the word "vicinity" required defining, it was the privilege of the defendant in the case to request an instruction containing such definition, which it did not do. It is said that the instruction should have been limited "to ores similar in class." The presumption is that no evidence was received relating to the value of ores in the vicinity except ores of the same vein and of the same general character. It does not appear that any objection was offered to the introduction of any evidence as to value, because the ores were not of the same class.

Instruction 9 relates to the issue of title, and as this issue was disposed of by the former opinion and decision of this court as to the title is the law of the case.

Sweeney v. Hanley, 126 Fed. Rep. 97.

As a mater of fact, however, the law is correctly stated in this instruction.

Lindley on Mines, 2nd Ed., Vol. 2, Sec. 598.

There is no evidence that the discovery vein was a part of a system of veins, but on the contrary, according to all the evidence contained in the record, the discovery vein stands by itself without any spurs or off-shoots.

It is claimed that instruction 5 "shifted the whole burden of proof as to the discovery vein," and instruction 8 created "a presumption as to the continuity of the vein."

That instruction 8 was correct, see:

Wakeman v. Norton, 49 Pac. Rep. 283.

Lindley on Mines, 2nd Ed. Vol. 2, Sec. 615, and cases cited.

In considering the objection to instruction 5, it should be remembered that it was a conceded fact in the case that the Drum Lummon vein has its apex wholly within the St. Louis claim between the 520 and 108 foot planes, and partly within such claim between the 108 and 133 foot

planes. In view of this condition of affairs there could not possibly be a presumption that the plaintiff in error is the owner of the ores in controversy. All that the St. Louis Company was required to do at the second trial, was to establish its extralateral right to the discovery vein between the 520 and 133 foot planes. When it had done this the burden rested on the defendant to overcome the prima facie case resulting from the proof and presumption.

Whether or not the burden of proof ever shifts, it is not necessary to discuss. The court fully and correctly instructed the jury on the subject of burden of proof, and instruction 5 is not in conflict therewith. The supreme court of the United States in the case of Sturm v. Boker, 150 U. S. 312, 340, held that where the defendants in a case admitted that the signatures to a document were genuine but claimed that the body of the document was forged, the "burden of proof" was upon them to establish that the written part above the signatures was forged. In the case at bar, when the Montana Company admitted that the ore was taken from that part of the Drum Lummon vein which has its apex within the St. Louis claim, the burden was clearly upon it to show that it owned the ore.

Instructions 5 and 8 both relate to the issue of title, and this issue was foreclosed and eliminated from the case by the former decision of this court. Any inquiry with reference to these instructions is immaterial.

In concluding the discussion of this branch of the case, we respectfully submit that the charge, taken as a whole, contains a lucid and correct statement of the principles of the law applicable to the case.

* * * *

In the statement of the case contained in the brief of plaintiff in error it is said:

> "On the subject of damage, and as tending to show strongly and clearly the oppressive and outrageous character of the verdict, and the judgment standing against us, the business books of the plaintiff in error were introduced in evidence, and an abstract of them from Nov. 1st, 1898, to May 1st, 1899, the period when the ores claimed by the St. Louis Company, were mined and milled, appears, in the record, as "Defendant's Exhibit J." As tendng to show still further the excessive character of this verdict, this record shows the amount of ore worked, and of bullion received for each period of six months, from 1893 to 1898. inclusive."

In this connection we desire to call the attention of the court to the testimony of the witness Burrell, manager of the Montana Company. He says: "Some of the ore taken out between the 108 and 133 foot planes was shipped to the smelter. It is true that high grade ore was often mixed with low grade ore in order to keep up the average of the mine." (Record p. 170.)

Although the question of the sufficiency of the evidence to sustain the verdict is not before this court, because of the evident purpose on the part of counsel for plaintiff in error to convey the impression that the verdict is excessive, we have had printed and appended hereto the opinion of the lower court in overruling the motion for a new trial.

In conclusion, we respectfully submit that no error was committed by the lower court on the second trial of the

case, and that the judgment of said court should be affirmed.

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MEMORANDUM OPINION DELIVERED BY DISTRICT JUDGE WILLIAM H. HUNT IN OVERRULNG MOTION FOR NEW TRIAL.

The principal ground upon which the defendant asks for a new trial is that the verdict is excessive. Accepting the law to be correctly stated by Justice Story in the case of Whipple v. Cumberland Manufacturing Company, 29 Fed. Cases 935, we have the general rule as follows:

> "We take the general rule, now established, to be, that a verdict will not be set aside in a case of tort for excessive damages, unless the court can clearly see that the jury have committed some very palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated. The authorities, cited at the bar, are entirely satisfactory and conclusive on this subject. Indeed, in no case will the court ask itself, whether, if it had been substituted in the stead of the jury, it would have given precisely the same damages; but the court will simply consider, whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case; and it will be deemed so, unless the verdict is so excessive or outrageous, with reference to those circumstances, as to demonstrate, that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice, to mislead them." * * * "They may not be precisely, what we ourselves should have given, sitting on the jury; but we see no reason to say, that they can, in any sense, be treated as exces-

sive or unreasonable."

Applying this rule, I am clearly of the opinion that the motion should be overruled. Without entering upon an elaborate statement of the evidence, I shall content myself by saying that unless the verdict is against the rules of law, or unless it appears that the jury have suffered their passions, their prejudices or their perverse disregard of justice, to mislead them, it must stand.

It appears that Parks and Keerl, two of the witnesses for the plaintiff, made a survey of the stopes and cavities from which ore had been taken, for the purpose of determining the quantity of ore extracted. Parks in his testimony says:

> "Mr. Keerl and myself made a careful survey of the ground and actually measured all of the stopes and cavities from which ore had been removed."

Parks designated the different stopes as blocks, and they were referred to in the testimony as such. In some instances a single stope contained two blocks, and the division of the stope was made because a part of the stope was on one side of the 108 foot plane, and a part on the other, and it was contended on the former trial of the case that the plaintiff was limited in its recovery to the ore extracted north of the 108 foot plane. Blocks 4 and 9 constituted a single stope and are divided by an imaginary plane. The same is true of blocks 5 and 10. The defendant admits that all of the ore taken from the vein north of the 133 foot plane and east of the west line of the compromise strip, except the ore extracted in extending the 40 foot tunnel and the ore extracted in extending the 20 feet level to the north side of the defendant's apex shaft and blocks 4 and 9 was extracted by it. The question of

whether or not the ore in blocks 4 and 9 has been removed, and if so by whom, was disputed and was clearly a matter for decision by the jury. There was ample evidence to sustain a finding by the jury that these blocks had been removed by the defendant.

As a matter of fact this action was instituted in September, 1893, and at least from that time the defendant had notice that it would be called upon to account for the ore extracted. No proof was offered by the defendant of the tonnage of the ore taken out, although the defendant could have determined the tonnage by weighing the ore and also by measuring the stopes the same as the plaintiff did. The witness Burrell, manager of the defendant company, testified that all of the ore between the apex shaft and the 133 foot plane was extracted prior to June 1st, 1899. According to the measurements of the stopes made by the witnesses for the defendant, the ore extracted from blocks 1 to 10, inclusive, amounted to 2,118.9 tons. Calculating the tonnage of the ore outside of these blocks between the two planes, assuming the thickness of the ore body to be 7.29 feet horizontally and 6.18 feet at right angles to the walls, which Parks testifies is the average width of the different stopes, we obtain a result of 1,040.53 tons. Adding this amount to the tonnage in blocks 1 to 10, inclusive, a tonnage of 3,158.62 tons is obtained. As the plaintiff could only determine the width of the ore bodies from the width of the stopes, and it was possible for the defendant to produce evidence, showing the tonnage of the ore extracted, which it did not do, the jury were entitled to regard the width of the ore body as plaintiff's witnesses testified to it. The plaintiff was required to produce the best evidence which it has been able to obtain concerning the matter. In determining the tonnage, Parks adopted as a basis 13

cubic feet per ton. In order to ascertain the number of cubic feet required to make a ton he made tests of the specific gravity of the ore.

Counsel for defendant contend that the width of the ore body did not exceed five feet, that blocks 4 and 9 should not be included, that there was at least five feet of surface wash which should be deducted, and that the ore between the apex shaft and the 108 foot plane has not been extracted. They contend that acording to the weight of the testimony the tonnage of the ore extracted does not exceed 1,728 tons. As the defendant could have furnished evidence showing the exact amount of ore extracted, but has not done so, the jury under the rules of law were justified in resolving uncertainty as to the amount of the ore, in favor of the plaintiff. There was evidence showing the the average width of the stopes to be over 7 feet. If we calculate the quantity of the ore upon the basis that the width of the ore body was 7 feet, and allow all the other claims of the defendant with reference to the deductions that should be made, the tonnage would be in excess of 2,400 tons. If, however, we treat blocks 4 and 9 as having been extracted by the defendant, the tonnage would be increased by over 100 tons, or the total tonnage would exceed 2,500 tons.

It is claimed by counsel for defendant that in determining the value of the ore extracted, there should be accepted as the basis for the calculation the average value per ton of the ore extracted by the plaintiff from the Drum Lummon vein, for which it received approximately $111,000.00. The ore extracted by the plaintiff in extending the 40 foot level beneath the compromise strip was included as a part of the ore from which it realized this sum of $111,000.00. The defendant on June 10th, 1895, instituted an action

against the plaintiff to recover for the ore taken from beneath the compromise strip in extending the 40 foot tunnel and alleging the quantity to be 224 tons of the value of $45,766.00. So we find that of the ore extracted by the plaintiff from the vein at least 224 tons which was taken from along the strike of the vein between the 108 and 133 foot planes, was of the value of over $200.00 per ton. It is in evidence that the ore in the vein decreases in value as you go northward from the 108 foot plane. The ore taken by the plaintiff was taken from above the 85 foot level and west of the compromise strip. A part of the ore was necessarily of the same value of blocks 4 and 9. To what extent the ore decreased in value as you go northward along the strike of the vein from the west line of the compromise strip does not clearly appear. It does appear, however, that a small quantity of the ore to the east of the west line of the compromise strip was taken by the plaintiff. The defendant commenced an action against the plaintiff to recover for this ore or its value, and alleged the quantity of the ore to be 8 tons, and its value $1,600.00. During the trial of the case several tons of ore taken from a drift north of the Montana Company's apex shaft and immediately above what the plaintiff designates as blocks 4 and 9 were sent to the smelter. The returns from this ore show its value to be one hundred and thirty dollars and some cents per ton, the smelter returns, too, representing but 95 per cent of the assay value. It also appears that there was from 10 to 20 per cent of waste in the ore. If an allowance is made for the waste, the assay value would be over $160.00 per ton. It further appears that this ore did not include the rich ore on the hanging wall. A sample of this rich ore was produced and assayed, which showed a value of over $360.00 per ton. Parks, from samples

taken by him, determined the value of the ore extracted from block 1 to be $145.00 per ton, from block 2 to be $146.02 per ton, from block 3 to be $203.88 per ton, from blocks 4 and 9 to be $165.10 per ton, and from blocks 5, 6, 7 and 10 to be $127.14 per ton, and from block 8 to be $13.28 per ton. Block 8 contained only 168.3 tons. Other evidence was produced showing the assay value of the samples of the ore taken from between the planes. One of these samples showed a value of $261.70 per ton, another a value of $112.12 per ton.

It is in evidence that the Montana Company's apex shaft was sunk to a depth of over thirty feet in 1903. There is also some evidence that blocks 4 and 9, or a part thereof, were extracted in the same year. All of the ore taken by the defendant was extracted prior to June 1st, 1899. The jury were therefore warranted in allowing interest on the part of the value of the ore taken, from 1903, and on the value of the ore taken from June 1st, 1899. The verdict was for $195,000.00. Calculating the tonnage at 2,500 tons, the verdict would represent a value per ton of $78.00, without interest. If interest was allowed from June 1st, 1899, which would be, at the legal rate, for convenience, let us say approximately 50 per cent, the value of the ore as determined by the jury was $130,000.00, or $52.00 per ton.

As I believe the jury were correctly instructed as to the rule of damages which applied to the case, the quantum of damages was a question for them, subject, of course, to the power of the court to set aside their verdict if the damages awarded were so great as to indicate passion or prejudice on their part. I think it proper for me to say that the jury was exceptional in its intelligence. They gave the closest consideration to the testimony, and to assist them were allowed by consent of counsel to take memoranda

of the specific claims made as to the amount and value of ores alleged to have been taken by the defendant. The contentions of counsel were argued before them with detailed analysis. They deliberated nearly 24 hours, and rendered a verdict, which though in a sum much less than the plaintiff asked for, is supported by the evidence, and in the absence of circumstances or facts which demonstrate that it is excessive, must be upheld as fair and reasonable.

The other grounds of motion for a new trial, addressed particularly to the law as given in the charge, are not well taken, in my judgment. The general verdict was the announcement to the court of the answer or judgment of the jury, finding that the facts established by the evidence were as plaintiff alleged, and as put in issue by the pleadings. The verdict was a conclusion, made after deliberation, upon facts found to the satisfaction of the jurors,—facts necessarily establshed to their satisfaction, subject always to rules of law as given by the court. Satisfaction may be by a preponderance of evidence in some instances, as here where general instructions were given upon burden and preponderance; or it may be by proof of a fact beyond a reasonable doubt, as in criminal cases; or it may be by presumptions, which, at law, unless overcome, direct the mind to satisfaction of the truth of an allegation. But, in each instance, evidence to the satisfaction of a jury means such evidence as in amount is adequate to justify them in adopting the conclusion in support of which it is adduced.

Sections 3112-3390, Mont. Code Civ. Proc.

Taking the whole charge therefore, I cannot believe the jury could have understood the word "satisfaction" as requiring a degree of proof higher than that demanded by the law, which was explained generally.

Regarding it as unnecessary to discuss further the

grounds stated in defendant's motion, they will be overruled, as not well taken. Motion denied.

August 21, 1905.

WILLIAM H. HUNT,

Judge.